

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Petition of the Wireless Consumers Alliance, Inc. for a Declaratory Ruling concerning whether the provisions of the Communications Act of 1934, as amended, or the jurisdiction of the Federal Communications Commission thereunder, serve to preempt state courts from awarding monetary relief against commercial mobile radio service ("CMRS") providers (a) for violating state consumer protection laws prohibiting false advertising and other fraudulent business practices, and/or (b) in the context of contractual disputes and tort actions adjudicated under state contract and tort laws.

File No. _____

TO: The Commission

**APPENDIX OF EXHIBITS IN SUPPORT OF
PETITION FOR DECLARATORY RULING**

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Dated: July 15th, 1999

Attached hereto are true and correct copies of the following documents submitted in support of Wireless Consumers Alliance, Inc.'s Petition for Declaratory Ruling:

- Exhibit 1: Memorandum of Points and Authorities of Defendants L.A. Cellular and AT&T Wireless Services in Support of Motion to Strike Improper Claims For Relief in Second Amended Complaint;
- Exhibit 2: Defendants L.A. Cellular's and AT&T Wireless Service's Reply Brief in Support of Motion to Strike Improper Claims for Relief in Second Amended Complaint;
- Exhibit 3: Plaintiffs' Opposition to Motion to Strike;
- Exhibit 4: February 11, 1999 Order Granting Defendants' Motion to Strike;
- Exhibit 5: Petition for Writ of Mandate or Other Extraordinary Relief; Memorandum of Points and Authorities;
- Exhibit 6: Preliminary Opposition to Petition for Writ of Mandate or Other Extraordinary Relief;
- Exhibit 7: June 6, 1999 Alternative Writ of Mandate;
- Exhibit 8: June 15, 1999 Order Staying Proceedings; and
- Exhibit 9: Mike Mills, Cell-Phone Billing Suit To Proceed; High Court Doesn't Halt Rounding Case, Washington Post, Feb. 23, 1999.

DATED this 15th day of July, 1999

Respectfully submitted,

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

MARCIA SPIELHOLZ, on behalf of herself
and all others similarly situated; DEBRA
PETCOVE; et al.

Plaintiffs,

v.

LOS ANGELES CELLULAR TELEPHONE
COMPANY, a partnership; et al.

Defendants.

CASE NO. BC186787

Assigned For All Purposes To
The Hon. Wendell Mortimer, Jr.

**MEMORANDUM OF POINTS AND
AUTHORITIES OF DEFENDANTS
L.A. CELLULAR AND AT&T WIRELESS
SERVICES IN SUPPORT OF MOTION TO
STRIKE IMPROPER CLAIMS FOR
RELIEF IN SECOND AMENDED
COMPLAINT; DECLARATION OF
CHRISTINE NAYLOR IN SUPPORT
THEREOF**

Hearing Date: February 4, 1999
Time: 9:00 a.m.
Dept: 56

CLASS ACTION

Exhibit 1

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 In plaintiff Marcia Spielholz's Second Amended Complaint ("SAC"), Spielholz and
5 two newly-added class representatives continue to allege that Los Angeles Cellular Telephone
6 Company ("L.A. Cellular") advertised and sold its cellular service as qualitatively better and
7 geographically broader than it is. Because plaintiffs allegedly "received substantially less
8 service than that for which they contracted" plaintiffs seek an injunction as well as "all sums
9 wrongfully obtained" by L.A. Cellular through an award of damages, restitution, and/or
10 disgorgement of profits. (*See e.g.* SAC at ¶¶ 33, 35 attached as Exhibit A to Declaration of
11 Christine Naylor.) In seeking an award of damages, restitution and/or disgorgement,
12 however, plaintiffs are asking this Court to determine what rate "should have" been paid for
13 the allegedly diminished level of service that plaintiffs assert they received. Any such relief
14 would be the legal and logical equivalent of rate regulation and is expressly preempted by
15 federal law. Consequently, defendants L.A. Cellular and AT&T Wireless Services, Inc. move
16 to strike plaintiffs' claims for damages, restitution and disgorgement on the grounds that such
17 relief is unavailable, improper and should be stricken under California Code of Civil
18 Procedure Section 436 (b).

19 **II.**

20 **PLAINTIFFS' ALLEGATIONS**

21 Each of plaintiffs' seven causes of action attacks L.A. Cellular's representations about
22 its available calling area as deceptive. (SAC at ¶¶ 2, 3, 4, 20, 24, 25 and 33.) Plaintiffs claim
23 that L.A. Cellular induced prospective customers to subscribe to cellular service with the
24 promise that the service would be "seamless" between the California/Nevada border and
25 Catalina. (*Id.* at ¶¶ 26, 28, 29 and 32.) Plaintiffs allege the service is not seamless and, in
26 fact, areas exist within L.A. Cellular's four-county calling area where subscribers cannot place
27 calls. (*Id.* at ¶¶ 2, 3, 31 and 32.) As a result, plaintiffs alleged that they were "victimized" by
28 L.A. Cellular's advertising and received substantially less cellular service than they contracted

1 for when they initially subscribed. (*Id.* at ¶ 33.) The newly-added class representative Debra
2 Petcove is alleged to have subscribed to cellular service because she believed she would be
3 able to use her cellular phone near her home in the Pacific Palisades but she alleges she was
4 disappointed and, therefore, injured when she discovered that she could not place calls in the
5 canyons near her home. (*Id.* at ¶ 32.) Ms. Petcove, on behalf of herself and a putative class
6 of cellular subscribers, seeks an order enjoining L.A. Cellular's allegedly misleading
7 advertising. She also seeks to recover a portion of her service fees through an award of
8 compensatory damages, restitution and disgorgement of profits obtained by L.A. Cellular.
9 (*Id.* at ¶¶ 4 and 35.) Although Ms. Petcove (and presumably other members of the putative
10 class) continued to subscribe to L.A. Cellular's service for approximately four years after
11 discovering the alleged existence of gaps in L.A. Cellular's coverage area, she seeks an award
12 by this Court to compensate her for the difference between the value of the service she says
13 she contracted for and the service she actually received during that four year period. Whether
14 the Court awarded damages, restitution or ordered disgorgement of a certain amount of
15 L.A. Cellular's profits, the Court would have to set a fee value on the alleged discrepancy
16 between the service plaintiffs claim they expected and the service they received.

17 III.

18 STATE COURTS ARE PRECLUDED FROM SETTING CELLULAR 19 RATES AS PART OF A DAMAGES AWARD THUS PLAINTIFFS' 20 CLAIMS FOR MONETARY RELIEF SHOULD BE STRICKEN

21 Plaintiffs have not limited themselves to simply challenging the reasonableness and
22 veracity of L.A. Cellular's advertising. In addition to injunctive relief, plaintiffs seek
23 monetary recovery based upon an alleged discrepancy between the value of the cellular
24 service advertised by L.A. Cellular and the value of service actually received by plaintiffs.
25 The recovery of service fees based on this alleged discrepancy cannot be made without a
26 determination by the Court of what reasonable rates should have been. As the Supreme Court
27 noted in the recent case, *AT&T v. Central Office Telephone, Inc.*, 118 S. Ct. 1956, 1998
28 (1998), challenges to rates take many forms and go beyond actions which simply allege that

1 the rate itself is unreasonable. "Rates . . . do not exist in isolation. They have meaning only
2 when one knows the services to which they are attached." *Id.* There is no way for this Court
3 to award the monetary relief sought by plaintiffs without first deciding what a "fair" rate
4 would be for the service received. Thus, plaintiffs' claims for damages, restitution, and/or
5 disgorgement are preempted by the Communications Act and must be stricken from the SAC.

6 **A. Plaintiffs' Challenge Regarding The Quality Of L.A. Cellular's Service,**
7 **And Their Corresponding Request For Monetary Recovery, Is Preempted**
8 **By Federal Law.**

9 **1. All State Regulation Of Cellular Rates Is Preempted By The Federal**
10 **Communications Act.**

11 Plaintiffs' claims for damages, restitution and disgorgement of profits must be stricken
12 because they are expressly preempted by Section 332(c)(3)(A) of the Communications Act.
13 Section 332(c) expressly preempts all forms of state regulation of rates charged for cellular
14 service:

15 (3) State Preemption

16 (A) Notwithstanding sections 152(b) and 221(b) of this title, **no State or local**
17 **government shall have any authority to regulate the entry of or the rates**
18 **charged by any commercial mobile service or any private mobile service,**
except that this paragraph shall not prohibit a State from regulating the other
terms and conditions of commercial mobile services. . . .

19 47 U.S.C. § 332(c)(3)(A) (emphasis added);¹ see, e.g., *In re Petition Of California To Retain*
20 *Regulatory Authority Over Intrastate Cellular Services*, 10 F.C.C.R. 7486, at ¶ 18, 1995 WL
21 314451 (F.C.C. May 19, 1995) ("*California Report and Order*").

22 Before 1993, regulation of the cellular telecommunications industry was divided
23 between federal and state authorities. The Omnibus Budget Reconciliation Act of 1993, Pub.
24 L. No. 103-66, 107 Sta. 312 (1993), amended the Communications Act by adding Section

25
26 ¹ The Communications Act defines "commercial mobile service" so as to include wireless
27 telephone service. See 47 U.S.C. § 153; *Connecticut Dep't of Public Utility Control v. F.C.C.*, 78
28 F.3d 842, 845 (2d Cir. 1996); *Esquivel v. Southwestern Bell Mobile Systems, Inc.*, 920 F. Supp.
713 (S.D. Tex. 1996).

1 332, which revamped the regulatory structure and "replace[d] traditional regulation of mobile
2 services with an approach that brings all mobile service providers under a comprehensive,
3 consistent regulatory framework" *Connecticut Dep't of Public Utility Control v. F.C.C.*,
4 78 F.3d at 845 (citing *Second Report and Order, Implementation of Sections 3(n) and 332 of*
5 *the Communications Act*, 9 F.C.C.R. 1411 (1994)).²

6 By the plain language of Section 332(c)(3)(A), Congress unequivocally expressed its
7 intent to displace *all* state regulatory authority over rates charged for cellular service. *See*
8 *California Report and Order* at ¶ 18 (Section 332(c)(3)(A) "express[es] an unambiguous
9 congressional intent to foreclose state regulation in the first instance"); *see also Jones v. Rath*
10 *Packing Co.*, 430 U.S. 519, 525 (1977) (Congress' preemptive intent may be "explicitly stated
11 in the statute's language"); *MCI Telecommunications Corp. v. Graphnet, Inc.*, 881 F.
12 Supp. 126, 131 (D.N.J. 1995) (recognizing that "[a]s a result of the broad provisions of the
13 Communications Act, courts have held that state causes of action based on regulated activities
14 are preempted").

15 Instead of inconsistent state-by-state regulation of wireless service rates, Congress
16 placed all cellular communications services on an equal footing nationwide. First, the
17 amended Communications Act expressly preempts *all* state regulation of cellular rates.³
18 47 U.S.C. § 332(c)(3)(A). Second, pursuant to Sections 201 and 207, Congress provided a
19

20
21 ² Previously the California Public Utilities Commission ("CPUC") had exclusive jurisdiction to
22 regulate California cellular service rates. *See generally* Cal. Pub. Util. Code § 728. California
23 petitioned the Federal Communications Commission ("FCC") to retain CPUC regulatory authority
24 over cellular rates in California. The FCC denied the petition and 47 U.S.C. § 332(c)(3)(A)
became effective in California on August 8, 1995. *See In re Petition Of California To Retain*
Regulatory Authority Over Intrastate Service Rates, 1995 WL 468206 (F.C.C. Aug. 8, 1995).

25 ³ As discussed below, actions for monetary relief can constitute disguised retroactive rate
26 adjustments and therefore be preempted. *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571,
27 578-79 (1981) (state court damage action over contract which had been approved by Federal
28 Power Commission constituted impermissible attempt to obtain retroactive rate change). Section
332(c)(3)(A) makes no distinction between retroactive or prospective rate regulation. It divests
states of all authority to regulate rates, whether retroactive or prospective.

1 federal remedy for anyone injured by violation of the Act.⁴ Congress deliberately created a
2 national regulatory policy for the provision of service and, to effectuate the policy, has
3 foreclosed state rate regulation in any form, legislative, executive, or *adjudicatory*.
4 *California Report and Order*, at ¶ 18; see also *California Report and Order* at ¶ 24
5 (recognizing that in preempting the states' authority to regulate wireless service rates,
6 Congress intended to avoid the problem in which a state court award of rate-related damages
7 would create "a [regulatory] policy that is balkanized state-by-state").

8 2. State Judicial Action Is A Form Of State Regulation.

9 It is well established that judicial action constitutes a form of state regulation. See
10 *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948) (judicial branch of state government may effect
11 state action). In *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), the
12 Supreme Court held that monetary awards may constitute state regulation:

13 Our concern is with delimiting areas of conduct which must be free from state
14 regulation if national policy is to be left unhampered. **Such regulation can be**
15 **as effectively exerted through an award of damages as through some form**
16 **of preventive relief.** The obligation to pay compensation can be, indeed is
17 designed to be, a potent method of governing conduct and controlling policy.
18 Even the States' salutary effort to redress private wrongs or grant compensation
19 for past harm cannot be exerted to regulate activities that are potentially subject
20 to the exclusive federal regulatory scheme.

21 *Id.* at 247 (emphasis added). Even if this Court finds that it has jurisdiction over the limited issue of
22 the reasonableness of L.A. Cellular's advertising, any restitution, disgorgement or damage award
23 would necessarily require this Court to determine an amount that plaintiffs were allegedly
24 "overcharged" for the service they did receive or, in other words, what the "reasonable" rate should
25 have been. See *Day v. AT&T Corp.*, 63 Cal. App. 4th 325, 340 (1998) (awarding monetary relief in
26 action under Bus. & Prof. Code §§ 17200 and 17500 for failure by a carrier to make disclosures in its
27 advertising "would enmesh the court in the rate-setting process"). In *Day*, the court held that so long
28

⁴ Congress has created a right of action under the Communications Act. Section 201(b) provides that any "charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful. . . ." 47 U.S.C. § 201(b). Section 207 vests exclusive jurisdiction over claims arising under Section 201(b) in either the federal courts or the FCC.

1 as plaintiffs limited their claim to injunctive relief and did not seek monetary recovery - - including
2 damages, restitution or disgorgement - - plaintiffs could proceed with their action.⁵ *Id.* at 337. This
3 is precisely the type of rate-making function Congress has taken away from the states.

4 **B. Plaintiffs' Attempt To Re-Characterize Its Complaint Fails So Long As**
5 **They Seek Recovery Of Rates Paid.**

6 In response to the Court's order sustaining L.A. Cellular's demurrer, plaintiffs have
7 attempted to amend their Complaint by omitting overt references to matters that fall squarely
8 within the FCC's jurisdiction. For instance, plaintiffs no longer directly challenge the
9 propriety of the maps that L.A. Cellular files with the FCC (*see* Original Complaint at ¶ 22)
10 because it is the FCC that defines the area depicted as a "reliable service area" and it is the
11 FCC that requires L.A. Cellular to so advise subscribers of the area in which it provides
12 "reliable service." Instead, plaintiffs attempt to avoid this issue by characterizing their
13 allegations as a claim for misrepresentation and they describe these FCC-mandated materials
14 as "color maps showing a seamless coverage area" by L.A. Cellular. (SAC at ¶ 24.) This
15 strategy of paring down the Complaint fails so long as one of plaintiffs' ultimate goals is to
16 have a state court award monetary relief and thus necessarily decide what rates should have
17 been paid for L.A. Cellular's cellular service. Plaintiffs are not simply seeking to enjoin
18 L.A. Cellular's advertising. They seek a judicially-determined rebate or refund on the fees
19 paid by plaintiffs through their request for compensatory damages, restitution and/or
20 disgorgement. They allege they "received substantially less service than that for which they
21 contracted" and ask this Court to determine the reasonable fee attributable to the alleged
22 discrepancy between the service they contracted for and the service they received. (*See* SAC
23 at ¶ 33.)

24
25 ⁵ While *Day* involved the filed rate doctrine, its discussion on adjudication as rate-setting are fully
26 applicable here. *Id.* ("The net effect of imposing any monetary sanction on the respondents will
27 be to effectuate a rebate, thereby resulting in discriminatory rates. As we have seen, this matter
28 which is strictly of federal concern under the Federal Communications Act, and is, therefore,
barred by the filed rate doctrine.")

1 Courts faced with similar challenges have found that adjudication of the dispute
2 constituted rate regulation, which is preempted by Section 332(c)(3)(A). For example, the
3 court in *In re Comcast Cellular Telecom. Litigation*, 949 F. Supp. 1193 (E.D. Pa. 1996), held
4 that plaintiffs' challenge to a practice for measuring call length was preempted by Section
5 332(c)(3)(A). The *Comcast* plaintiffs couched their claims as an unfair trade practice, breach
6 of contract, breach of the implied duty of good faith and fair dealing, and as a unjust
7 enrichment and restitution claim. While the *Comcast* plaintiffs maintained that their
8 complaint was directed at a failure to disclose the practice, the court looked past the form of
9 the allegations and examined the type of relief sought. The court observed that the counts:

10 attack[] the reasonableness of the method by which Comcast calculates the
11 length and, consequently, the cost of a cellular telephone call. As such,
12 Plaintiffs' claims present a direct challenge to the calculation of the rates
13 charged by Comcast for cellular telephone service. The remedies they seek
14 would require a state court to engage in regulation of the rates charged by a
15 [cellular service] provider, something it is explicitly prohibited from doing.

16 949 F. Supp. at 1201.

17 The court in *Comcast* examined the remedies requested in determining that the
18 plaintiffs were, in fact, challenging rates. *Id.* at 1201, 1203. Here, too, the claims and relief
19 sought by plaintiffs reveal that they seek to regulate rates by reducing the charge for the
20 allegedly deficient service received by the plaintiff class. These are the same kind of
21 remedies that led the *Comcast* court to find that plaintiffs' claims were impermissible attempts
22 to regulate rates. *Id.*

23 The few cases where courts have not found preemption, under Section 332(c)(3)(A),
24 over state law claims concerning cellular rates and practices generally fall into one of two
25 categories - - (1) they either address situations where defendants sought to remove cases to
26 federal court based on a theory of *complete preemption*, which does not apply here,⁶ or

27 ⁶ Removal requires both preemption of the state claims and a determination under the artful
28 pleading doctrine that the plaintiff's state law complaint in fact alleges federal claims. *See*
Metropolitan Life, 481 U.S. at 63, 107 S. Ct. at 1546 (federal preemption is a defense to state law
claims, but is not a basis for removal unless plaintiff's well-pleaded complaint raises issues of
federal law); *Esquivel v. Southwestern Bell Mobile Systems, Inc.*, 920 F. Supp. at 716 (same); *but*
[Footnote continued on next page]

1 (2) they address only a failure to disclose an alleged practice rather than, as here, attack the
2 practices themselves and seek monetary damages or restitution, thus, challenging the rates.
3 *See, e.g., Tenore v. AT&T Wireless Services*, 136 Wash. 2d 322 (Wash. 1998) (no preemption
4 found where plaintiffs "do not attack the reasonableness of [defendant's] practice of rounding
5 up call charges [but] challenge only nondisclosure of the practice");⁷ *see also Hardy v.*
6 *Claircom Communications Group, Inc.*, 86 Wash. App. 488, 937 P.2d 1128, 1132-33 (Wash.
7 App. Ct. 1997) (preemption found where plaintiffs challenge the reasonableness of rounding
8 up practice).

9 The cases finding that state courts are precluded from deciding matters relating to
10 cellular rates and practices are applicable here because plaintiffs continue to challenge
11 L.A. Cellular's advertising as misleading and they seek to recover monetary damages for the
12 allegedly diminished level of cellular service received. Because their claims for monetary
13 relief are tantamount to rate regulation they are preempted and must be stricken.

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21
22 [Footnote continued from previous page]

23 *see Lee v. Contel Cellular of the South, Inc.*, No. CV-95-1057-JH (S.D. Ala. Nov. 21, 1996)
24 (denying motion to remand, court found state law breach of contract claim attacking "rounding"
25 practice completely preempted by Communications Act). Defendants here are not seeking
26 removal and are, therefore, not required to meet the higher standard of those cases.

27 ⁷ The *Tenore* decision, which defendants believe was wrongly decided in any event, was presented
28 for review to the United States Supreme Court in a Petition for Writ of Certiorari on December 9,
1998. A copy of the Petition is attached hereto as Exhibit B.

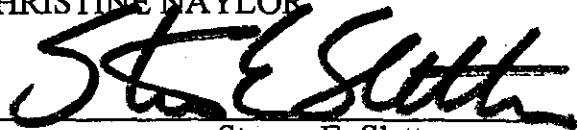
1 IV.

2 CONCLUSION

3 Plaintiffs' claims for damages, restitution and/or disgorgement of profits are expressly
4 preempted by the Communications Act. By seeking a remedy beyond merely an injunction
5 relating to L.A. Cellular's advertising, plaintiffs' prayer for relief will require this Court to
6 engage in a rate-making exercise that is in direct conflict with the Congressional intent to
7 remove all state regulation of cellular service rates. Consequently, plaintiffs' requested relief
8 is preempted by Section 332(c)(3)(A) and should be stricken from the Second Amended
9 Complaint.

10 DATED: January 15, 1999

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DECLARATION OF CHRISTINE NAYLOR

I, Christine Naylor, declare and state as follows:

1. I am an attorney duly licensed to practice law before all of the courts of the state of California and before this Honorable Court. I am an attorney in the law firm of Gibson, Dunn & Crutcher LLP and am one of the attorneys responsible for the representation of Los Angeles Cellular Telephone Company and AT&T Wireless Services, Inc. in the class action filed by Marcia Spielholz, *Spielholz, et al. v. Los Angeles Cellular Telephone Company, et al.*, L.A.S.C. No. BC186787. I submit this declaration in support of Defendants' Motion to Strike Improper Claims For Relief In Second Amended Complaint. I have personal, first hand knowledge of the matters stated herein. If called upon to do so, I could and would competently testify thereto.

2. Attached hereto as **Exhibit A** is a true and correct copy (without attachments) of the Second Amended Complaint filed in December 1998 in this action.

3. Attached hereto as **Exhibit B** is a true and correct copy of the Petition for Writ of Certiorari, filed on December 9, 1998 with the United States Supreme Court, regarding the decision by the Washington Supreme Court in *Tenore v. AT&T Wireless Services*, 136 Wash. 2d 322 (Wash. 1998).

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed on January 15, 1998 at Los Angeles, California.



Christine Naylor

LL990070.054/6+

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16 SUPERIOR COURT OF THE STATE OF CALIFORNIA

17 COUNTY OF LOS ANGELES

18 MARCIA SPIELHOLZ, On Behalf of Herself and
All Others Similarly Situated; DEBRA
19 PETCOVE, On Behalf of Herself and All Others
Similarly Situated; and WIRELESS
20 CONSUMERS' ALLIANCE, INC., On behalf of
the General Public,

21 Plaintiffs,

22 vs.

23 LOS ANGELES CELLULAR TELEPHONE
24 COMPANY, a partnership; BELL SOUTH
CELLULAR CORPORATION, a Georgia
25 Corporation; AT&T Wireless Services, Inc., a
Delaware Corporation; and DOES 1 through 100,
26 inclusive,

27 Defendants.

Case No. BC186787

CLASS ACTION

SECOND AMENDED CLASS
ACTION COMPLAINT

DATE ACTION FIRST FILED:
02/27/98

1 Plaintiffs, Marcia Spielholz and Debra Petcove, on behalf of themselves and all
2 others similarly situated, and the Wireless Consumer's Alliance, on behalf of the general
3 public, allege as follows:

4 1. Defendant Los Angeles Cellular Telephone Company (hereinafter "LA
5 Cellular"), together with its joint venturers and/or general partners, defendants BellSouth
6 Cellular Corporation and AT&T Wireless Services, Inc., (collectively "defendants"), provides
7 cellular radio service to consumers in Los Angeles and surrounding cities and counties. The
8 advertising message, "Twice the Calling Area" is the cornerstone of LA Cellular's marketing
9 strategy, as is underscored by the slogan's registration as a trademark. In widely-distributed
10 advertisements, LA Cellular touts as its most important advantage over the only other
11 competing cellular service provider in the Los Angeles environs, a seamless calling area in
12 excess of 30,000 square miles "from anywhere between the Nevada and Arizona borders to
13 Catalina Island." True and correct copies of examples of LA Cellular's advertisements and
14 direct mailings to its subscribers are attached as Exhibits "A" - "J".

15 2. LA Cellular's representations about its calling area are inaccurate,
16 misleading and intentionally deceptive because there are gaps or "dead zones" in LA Cellular's
17 advertised coverage area. If an LA Cellular subscriber attempts to place a call in an area which
18 falls within one of these gaps, the call will not be connected. Knowing of the gaps in coverage
19 in its advertised service area, LA Cellular has, nevertheless, failed to disclose the existence of
20 these gaps to consumers.

21 3. On information and belief, plaintiffs allege that LA Cellular's
22 representations about its calling area are inaccurate, misleading and intentionally deceptive
23 because LA Cellular is aware that its system lacks the capacity to provide the seamless calling
24 area it advertises, even where a gap or "dead zone" does not exist. The effective calling area of
25 LA Cellular is limited to locations in which LA Cellular has designed its system, invested
26 resources and installed equipment to provide access to its service. These locations in the
27 effective calling area generate the greatest profit potential for LA Cellular. In other areas, LA
28

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1 Cellular has not invested sufficient resources and equipment, knowing that subscribers will
2 effectively be without access to its service.

3 4. By this consumer class action, plaintiffs seek to enjoin defendants LA
4 Cellular and its general partners, controlling entities and/or joint venturers, described infra,
5 from continuing their fraudulent, unfair and unlawful business acts and practices and false and
6 misleading advertising, to compel defendants to disgorge and/or restore all monies which they
7 unlawfully obtained through their fraudulent and unfair business practices, and to impose a
8 constructive trust on all monies by which defendants were unjustly enriched, as well as to
9 award compensatory and exemplary damages, fees, costs, and interest on all such sums.

10 5. This Second Amended Class Action Complaint alleges six causes of
11 action against all defendants:

12 (a) violation of Business and Professions Code §§ 17200, *et seq.*: for
13 defendants' acts of unfair competition by engaging in unlawful, unfair and/or fraudulent
14 business practices to the detriment of plaintiffs and all others similarly situated, as well as the
15 general public of this state;

16 (b) violation of Business & Professions Code §§ 17500, *et seq.*, for
17 defendants' misleading and untrue statements made by defendants with the intent to sell
18 defendants' services and equipment to plaintiffs and all others similarly situated;

19 (c) violation of the Consumers Legal Remedies Act ("CLRA"), Civil
20 Code §§ 1750, *et seq.*, for defendants' deceptive practices, unlawful methods of competition,
21 false advertising and/or proscribed acts as defined in the CLRA; and

22 (d) fraud and deceit: for (i) defendants' uniform misrepresentations
23 to plaintiffs and the class that defendants' advertised calling area was seamless and that its
24 system could be accessed anywhere by cellular phones sold and provided by defendants and
25 their agents, when, in fact, defendants knew such representations were false; and (ii) defendants'
26 intentional failure to disclose to plaintiffs and the class that defendants' calling area was not
27 seamless as advertised and could not be accessed anywhere by cellular phones sold and provided
28 by defendants and their agents;

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1 (e) negligent misrepresentation: for defendants' failure to fulfill their
2 duty to disclose to plaintiffs and the class the material facts discussed herein;

3 (f) breach of contract: for defendants' failure to provide cellular
4 telephones and service to plaintiffs and the class according to obligations owed under
5 subscription agreements entered into with plaintiffs and members of the class; and for

6 (g) breach of the implied covenant of good faith and fair dealing.

7 6. Plaintiffs Spielholz and Petcove assert all claims against all defendants and
8 seek class certification of all claims, whereas plaintiff Wireless Consumers' Alliance, Inc. asserts
9 its claims under Bus. & Prof. Code §§ 17200, *et seq.*, and Bus. & Prof. Code §§ 17500, *et seq.*, on
10 behalf of the general public.

11 JURISDICTION AND VENUE

12 7. Jurisdiction is proper in this Court. The allegations and claims for relief
13 in this Second Amended Class Action Complaint arise from acts committed in this state which
14 violate California's consumer protection laws. Plaintiffs allege violations of statutory
15 provisions governing unlawful, unfair and deceptive business and advertising practices
16 regarding the cellular service area actually provided to consumers. These claims may be
17 adjudicated under this State's lawful authority and are within the jurisdiction of this Court.

18 8. Venue is proper in this Court as plaintiffs and the class have entered into
19 contracts with defendants, by and through defendant LA Cellular, in Los Angeles County and
20 were damaged thereby, and a substantial number of the acts complained of herein took place in
21 Los Angeles County and defendant LA Cellular's principal place of business is in Los Angeles
22 County.

23 PARTIES

24 9. Plaintiff Marcia Spielholz is a resident of the County of Los Angeles, in
25 the State of California. From June 25, 1990 to March 18, 1994, plaintiff Spielholz subscribed
26 to analog cellular service provided by defendant LA Cellular. On March 18, 1994,
27 Ms. Spielholz entered into a new contract with LA Cellular to purchase a Motorola dual-mode
28 digital/analog portable cellular phone and to obtain digital and analog cellular service. On

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1 December 4, 1994 at 8:30 p.m. in Los Angeles, Ms. Spielholz was attacked in her car and shot
2 in the face and neck while attempting, unsuccessfully, to connect to 911 on her dual-mode
3 cellular phone.

4 10. Plaintiff Debra Petcove is a resident of the County of Los Angeles, in the
5 State of California and has been a subscriber to cellular telephone service supplied by defendant
6 LA Cellular for approximately four years.

7 11. Plaintiff, Wireless Consumers' Alliance, Inc. (the "Alliance"), is a
8 California non-profit public benefit corporation which has been organized to improve public
9 access to emergency services through cellular telephone communications.

10 12. Defendant, LA Cellular, is a California partnership, the headquarters for
11 which are located in Los Angeles, California. Its general partners and/or joint venturers are
12 defendants BellSouth Cellular Corporation and AT&T Wireless Services, Inc.

13 13. Defendant BellSouth Cellular Corporation ("BellSouth") is a Georgia
14 corporation, the headquarters for which are located in Atlanta, Georgia. BellSouth is a general
15 partner of, and/or joint venturer with, defendants LA Cellular and AT&T Wireless Services,
16 Inc.

17 14. Defendant AT&T Wireless Services, Inc. ("AT&T Wireless") is a
18 Delaware corporation, the headquarters for which are located in Kirkland, Washington. Its
19 general partners and/or joint venturers are defendants BellSouth and LA Cellular.

20 15. The true names and identities of defendants sued herein under California
21 Code of Civil Procedure § 474 as Does 1 through 100, inclusive, are currently not known to
22 plaintiff, who therefore sues these defendants by such fictitious names. Plaintiffs will seek to
23 amend this Second Amended Class Action Complaint and include these Doe defendants' true
24 names and capacities when they are ascertained. Each of the fictitiously named defendants is
25 responsible in some manner for the conduct alleged herein and for the damages suffered by
26 plaintiffs and the class they seek to represent.

27 16. At all times herein mentioned in the causes of action alleged herein, each
28 and every defendant was an agent and/or general partner of each and every other defendant. In

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committing the acts complained of herein, each and every defendant acted within the scope of its agency and/or partnership agreement and was acting with the consent, permission, authorization and knowledge of each of the remaining defendants, and perpetrated and/or aided and abetted the violations of law described herein. All actions of each defendant as alleged herein were ratified and approved by every other defendant or their officers, directors, controlling persons, agents, partners, or joint venturers. BellSouth and AT&T Wireless own, control and supervise LA Cellular.

CLASS ALLEGATIONS

17. Plaintiffs Marcia Spielholz and Debra Petcove bring this action on their own behalf and on behalf of all other persons similarly-situated, pursuant to the provisions of Code of Civil Procedure § 382, Civil Code §1781, Rule 23(a)(1)-(4), and Rule 23(b)(1)(2) or (3) of the Federal Rules of Civil Procedure, and case law thereunder, to which California courts have been directed by the California Supreme Court to look for guidance.

18. The class which plaintiffs Spielholz and Petcove seek to represent is defined as:

All persons who subscribed to cellular telephone services, both analog and digital, from LA Cellular from June 25, 1990 until the present.

19. Numerosity of the Class (Code Civ. Proc. § 382, Civ. Code § 1781(b)(1); Fed. R. Civ. P. 23(a)(1)): The class is composed of several hundred thousand persons, and possibly exceeds one million individuals, the joinder of which in one action would be impracticable. The disposition of their claims through this class action will benefit both the parties and this Court. The identities of individual members of the class are ascertainable through the billing records of defendant LA Cellular.

20. Existence and Predominance of Common Questions of Fact and Law (Code Civ. Proc. § 382; Civ. Code § 1781(b)(2); Fed. R. Civ. P. 23(a)(2) and (b)(3)): There is a well-defined community of interest in the questions of law and fact involved affecting the members of the class. The questions of law and fact common to the class predominate over questions which may affect individual class members, and include the following:

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1 (a) Whether defendants misrepresented or failed to disclose material
2 facts to plaintiffs and the members of the class regarding the breadth of its service and the
3 reliability of the equipment that could be accessed by consumers through the use of cellular
4 phones;

5 (b) Whether defendants' cellular service has characteristics, capacity,
6 benefits, uses or is a particular standard or quality which it is not;

7 (c) Whether the acts of defendants constituted a breach of contract
8 entered into for the provision of analog and/or digital cellular equipment and service;

9 (d) Whether the acts of defendants violated, inter alia, Business &
10 Professions Code §§ 17200, et seq., Business & Professions Code §§ 17500, et seq., Civil Code
11 §§ 1750, et seq., and state common and statutory law; and

12 (e) Whether the class has been damaged and/or suffered harm and, if
13 so, the extent of such damage and/or the nature of the equitable and injunctive relief, damages
14 or punitive damages to which each member of the class is entitled.

15 21. Typicality (Civ. Code § 1781(b)(3); Fed. R. Civ. P. 23(a)(3)): Having
16 contracted and paid for cellular service and equipment which could not be used anywhere
17 within the area advertised, plaintiffs Spielholz and Petcove are asserting claims that are typical
18 of the claims of the entire class. Plaintiffs and all members of the class have similarly sustained
19 monetary damages arising out of the defendants' violations of common and statutory law as
20 alleged herein.

21 22. Adequacy (Civ. Code § 1781(b)(4); Fed. R. Civ. P. 23(a)(4)): Plaintiffs
22 Spielholz and Petcove are adequate representatives of the class because their interests do not
23 conflict with the interests of the class members plaintiffs seek to represent. Plaintiffs will fairly
24 and adequately represent and protect the interests of the class in that she has no interest
25 antagonistic to those of the class. Plaintiffs have retained counsel who are competent and
26 experienced in the prosecution of class litigation.

27 23. Superiority (Code Civ. Proc. § 382; Fed. R. Civ. P. 23(b)(3)): A class
28 action is superior to other available means for the fair and efficient adjudication of the claims of

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1 plaintiffs Spielholz, Petcove and the class. Plaintiffs and the class have suffered irreparable
2 harm and damages as a result of defendants' unlawful and unfair conduct. Because of the size of
3 the individual class members' claims, few, if any, class members could afford to seek legal
4 redress for the wrongs complained of herein. Absent a class action, the class members will
5 continue to suffer losses and the violations of law described herein will continue without
6 remedy and defendants will be permitted to retain the proceeds of their misdeeds. Defendants
7 continue, to this day, to deny wrongdoing and to engage in the unlawful and unfair conduct
8 which is the subject of this complaint.

9 FACTUAL BACKGROUND

10 24. The cellular phone service coverage available to LA Cellular subscribers
11 is not accurately described in LA Cellular's advertisements because there exist gaps or "dead
12 zones" in LA Cellular's advertised coverage area. Notwithstanding these facts, which are
13 known to defendants, defendants continue to advertise and represent to consumers that
14 subscribers can access their service across a seamless 30,000 square mile area, from "anywhere
15 between the Nevada and Arizona borders to Catalina Island." Similarly, defendants repeatedly
16 referred to LA Cellular's "... a 30,000 square mile calling area" and featured in their
17 advertisements and marketing materials color maps showing a seamless coverage area. See, e.g.,
18 Exhibit "A" (*Los Angeles Times*: November 28, 1994, C-16) (emphasis added); Exhibit "B"
19 (1994 Map). LA Cellular represented in another advertisement: "If you're concerned about
20 calling areas and clarity, LA Cellular offers Twice the Calling Area and unrivaled clarity and
21 reception." See, e.g., Exhibit "C" (*Los Angeles Times*: April 27, 1993, D-5).

22 25. Based on its marketing studies, LA Cellular determined that fear was the
23 primary motivator for increasing its customer base beyond business users, to those who wanted
24 a cellular telephone to dial 911 in case of an emergency. In an effort to capitalize on the
25 increased profit potential, in the Summer of 1994, LA Cellular sent direct mailings to its
26 customers in a publication entitled, "Clear Talk" that included an article entitled " Cellular
27 Phones Becoming Crimefighters of the '90s [-] More People Buying Cellular Phones for Peace
28 of Mind." The article emphasized that approximately 600,000 calls a month are made to

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1 emergency phone numbers, such as 911, on cellular telephones, and cited a then-recent
2 national survey conducted by the Cellular Telecommunications Industry Association. The
3 article also represented that two-thirds (2/3) of the cellular subscribers cited personal safety, on
4 and off the road, as "the primary motivation for purchasing a cellular telephone." LA
5 Cellular's direct mailing also noted, "About half said they used their cellular phone to report
6 car trouble, a medical emergency, drunken drivers or criminal activity, according to the
7 survey." Finally, the publication noted that cellular phones, "[a]re often instrumental in
8 heading off dangerous situations on highways where conventional phones are not readily
9 available." The publication provided specific steps for LA Cellular subscribers to use to report
10 crimes by dialing 911 on their cellular telephones. The brochure was published and received
11 by Ms. Spielholz in the Summer of 1994, some six months prior to the incident in which she
12 was injured. See Exhibit "D" ("Clear Talk", Summer Issue 1994.)

13 26. Other LA CELLULAR advertisements and direct mailings to subscribers
14 also represented that its service as one which is effective in the event of an emergency:

15 (a) An ad which appeared numerous times in the *Los Angeles Times*
16 and which Ms. Spielholz saw represented, "Peace of mind. At a very low price. You never
17 know when you'll need emergency service. So if you have a cellular phone, keep it charged
18 and ready to go. And if you don't have one, buy one..." See, e.g., Exhibit "E" (*Los Angeles*
19 *Times*: January 21, 1994, C-10)(emphasis in original).

20 (b) Another ad which appeared in the *Los Angeles Times* numerous
21 times and which Ms. Spielholz saw featured a picture of an emergency call box and represented
22 "If you've ever used a freeway call box, you've probably already used our service. Because
23 when you call from any of the 7,000 call boxes, in any of the four LA counties, you're using
24 LA Cellular. Of course, you can get that same reliable service on your own cellular phone."
25 The ad further claimed, "[a]nd only LA Cellular gives you twice the calling area . . . so you can
26 count on us wherever you go." See, e.g., Exhibit "F" (*Los Angeles Times*: March 8, 1993, C-5).

27 (c) Another LA Cellular ad which appeared during the 1993 holiday
28 season proclaimed, "Great [d]eals [a]nd a great deal more . . . [a]nd when things are touch and

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1 go, its direct line to 911 will keep little boys and girls out of trouble!" See, e.g., Exhibit "G"
2 (*Los Angeles Times*: December 14, 1993, B-8) (emphasis added).

3 (d) An LA Cellular's brochure stated: "One of the greatest benefits
4 of owning a cellular phone is you can report emergencies to Cellular 911. Cellular 911 is a
5 service provided by the California Highway Patrol and it is a free cellular call." See, e.g.,
6 Exhibit "H" (1995-1996 LA Cellular brochure).

7 (e) In early 1994, LA Cellular underscored its representations to
8 plaintiffs Spielholz, Petcove and the members of the class that its service was effective in the
9 event of an emergency by publishing in the *Los Angeles Times* an announcement offering free
10 emergency phone calls for victims of the Los Angeles Northridge earthquake. See, e.g., Exhibit
11 "I" (*Los Angeles Times*: January 21, 1994, A-35).

12 (f) Another advertisement that appeared several times in the *Los*
13 *Angeles Times* LA Cellular's advertisements also claimed: "Reach anyone, anywhere. Isn't that
14 the point of a cellular phone?" See, e.g., Exhibit "J" (*Los Angeles Times*, October 3, 1994, C-16)
15 (emphasis added).

16 27. According to the U.S. Department of Justice in a study prepared one year
17 prior to the incident in which Ms. Spielholz was injured, violent victimization affected
18 approximately 3.1 adults out of 100 per year, and the likelihood of being car-jacked presented
19 the same risk as a motor vehicle accidental death.

20 28. Plaintiffs, and all others similarly situated, purchased their cellular
21 telephones and executed their service agreements promising to pay monthly fees in exchange
22 for defendants' promise to provide the seamless coverage described in written representations
23 disseminated in magazine and newspaper advertisements, direct mailings, in-store displays and
24 brochures.

25 29. In response to LA Cellular's advertising emphasizing safety, on
26 March 28, 1994, plaintiff Spielholz bought a new dual mode telephone so as to use Los Angeles
27 Cellular's Digital SST service. The primary impetus for her purchase of a cellular phone was
28 her concern for personal safety in the wake of the increasing incidence of carjackings and other

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1 violent crimes in the Los Angeles area. In reliance on LA Cellular's professed ability to
2 provide 911 access, plaintiff Spielholz felt a sense of security while driving throughout her
3 community, and to and from her place of employment in Santa Monica, California. In fact,
4 Ms. Spielholz made it a habit to carry her cell phone with her at all times, and to keep it ready
5 in the car, whether or not she intended to use it, in case an emergency arose.

6 30. On December 4, 1994, on Castle Heights Avenue in Beverlywood, in the
7 heart of LA Cellular's advertised coverage area, Ms. Spielholz was confronted by a car
8 containing two assailants who cut her off in an attempt to steal her vehicle. Although
9 Ms. Spielholz was initially able to maneuver around the assailants, a chase ensued in heavy
10 holiday traffic until the assailants finally caught up with her, cutting her off and causing front
11 end damage to her vehicle. During the time she was being chased, Ms. Spielholz desperately
12 attempted to contact the police by pressing "9-1-1" on her LA Cellular digital cellular
13 telephone. Over and over again, Ms. Spielholz dialed 911 but never was able to establish
14 contact using her cellular telephone. While still trying to access 911, Ms. Spielholz was shot in
15 the face by one of the assailants at close range through her window, shattering the glass and
16 causing the bullet to destroy the cellular telephone which was in plaintiff's hand.

17 31. Incredibly, no matter how many times she dialed 911, Ms. Spielholz
18 would have never gotten through, because LA Cellular had elected not to provide coverage for
19 its cellular subscribers in the geographic area in which the incident occurred. As it turns out,
20 the area in Beverlywood in which Ms. Spielholz attempted to call 911 falls within one of the
21 gaps in coverage which went purposely undisclosed to LA Cellular subscribers who depended
22 on service for emergencies.

23 32. Plaintiff Debra Petcove's primary motivation approximately four years
24 ago for her purchase of a cellular telephone and cellular service from LA Cellular was for use in
25 case of emergency. Ms. Petcove lives in Pacific Palisades and regularly travels through the
26 adjacent canyon which is especially susceptible to wild fires and mudslides and where
27 emergency access to cellular telephone service is particularly important. Ms. Petcove
28 reasonably believed that carrying her cellular telephone with her would enable her to protect

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1 herself and her family in the event that their safety was imperiled. Nonetheless, and
2 notwithstanding LA Cellular's written representations regarding its purportedly seamless
3 service, Ms. Petcove cannot obtain cellular service in these areas through which she and her
4 family frequently travel because this area falls within a purposefully undisclosed deadzone.

5 33. LA Cellular actively concealed from plaintiffs and the class the fact that
6 its advertisements and written representations regarding the breadth and reliability of its
7 service were inaccurate and misleading. Plaintiffs and the class were victimized by defendants'
8 misrepresentations and received substantially less service than that for which they contracted.

9 34. Defendants BellSouth and AT&T Wireless own, control and supervise
10 LA Cellular. Defendants knew that the acts of each and all of them constituted material
11 misrepresentations and fraudulent omissions designed to produce profits for each of them, as
12 pled under each of the theories alleged in this Second Amended Complaint, yet each defendant
13 knowingly gave substantial assistance to the wrongful conduct of the other defendants, thus
14 aiding and abetting the misconduct of the other defendants. Without such substantial
15 assistance and encouragement by the defendants, the wrongful acts could not have been
16 accomplished and would not have occurred.

17 35. Thus, as prayed for below, by this consumer class action, plaintiffs and
18 members of the class seek to enjoin defendants LA Cellular and its general partners, joint
19 venturers, and controlling entities from continuing to misrepresent the quality and
20 characteristics of the service it is able to provide, and to recover all sums wrongly obtained.

21 **FIRST CAUSE OF ACTION**
22 (Violation of Business & Professions Code §§ 17200, *et seq.*)
(Unfair and/or Fraudulent Business Practices)

23 [On Behalf of Plaintiffs Spielholz, Petcove and All Others
24 Similarly Situated and the Wireless Consumers' Alliance]

25 36. Plaintiffs hereby incorporate by reference the allegations contained in all
26 preceding paragraphs of this Second Amended Class Action Complaint.

27 37. Defendants' acts of continuing to knowingly disseminate in its
28 advertisements unfair, deceptive, untrue, or misleading statements about the cellular telephones

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1 they sell, their coverage area and other conditions of their cellular service, with the knowledge
2 that service subscribers would be unable to obtain the advertised benefits of defendants' service,
3 is a practice which constitutes fraud, deceit and false advertising, in violation of Business and
4 Professions Code §§ 17200, et seq. and §§ 17500, et seq.

5 38. Pursuant to Business and Professions Code § 17203, plaintiffs seek an
6 order of this Court enjoining defendants from continuing to falsely advertise their unlawful
7 business practices. Plaintiffs also seek an order enjoining defendants from failing and refusing
8 to:

- 9 (a) Make full restitution of all monies wrongfully obtained;
- 10 (b) Immediately cease their unlawful acts and practices; and
- 11 (c) Disgorge all ill-gotten revenues and/or profits.

12 **SECOND CAUSE OF ACTION**
13 **(Violation of Business & Professions Code §§ 17500, et seq.)**
14 **(Unfair and/or Fraudulent Business Practices)**
15 **(False Advertising)**

16 **[On Behalf of Plaintiffs Spielholz, Petcove and All Others**
17 **Similarly Situated and Plaintiff Wireless Consumers' Alliance]**

18 39. Plaintiffs hereby incorporate by reference the allegations contained in all
19 preceding paragraphs of this Second Amended Class Action Complaint.

20 40. Defendants' acts of continuing to knowingly disseminate unfair,
21 deceptive, untrue, or misleading statements about the cellular telephones they sell, their
22 coverage area and other conditions of their cellular service, with the knowledge that its service
23 subscribers would be unable to obtain the advertised benefits of defendants' equipment and
24 service, is a practice which constitutes fraud, deceit and unfair business practices in violation of
25 Civil Code §§ 1572, 1710, 1770.

26 41. Pursuant to Business and Professions Code § 17535, plaintiffs seek an
27 order of this Court enjoining defendants from continuing to falsely advertise or conduct
28 business via their unfair and/or fraudulent business practices. Plaintiffs also seek an order
enjoining defendants from failing and refusing to:

- (a) Make full restitution of all monies wrongfully obtained;

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1 (b) Immediately cease their unlawful acts and practices; and

2 (c) Disgorge all ill-gotten revenues and/or profits.

3 **THIRD CAUSE OF ACTION**
4 (Violation of Consumers Legal Remedies Act,
Civil Code §§ 1750, et seq.)

5 [On Behalf of Plaintiffs Spielholz, Petcove and All Others Similarly Situated]

6 42. Plaintiffs hereby incorporate by reference the allegations contained in all
7 preceding paragraphs of this Second Amended Class Action Complaint.

8 43. Defendants, and each of them, have engaged in deceptive practices,
9 unlawful methods of competition and/or unfair acts as defined by Civil Code §§ 1750, et seq.,
10 to the detriment of plaintiffs and the class. The following deceptive practices have been
11 intentionally, knowingly and unlawfully perpetrated upon plaintiffs and the class:

12 (a) In violation of Civil Code § 1770(a)(5), defendants' acts and
13 practices constitute misrepresentations that the cellular service in question has characteristics,
14 uses and/or benefits which it does not have;

15 (b) In violation of Civil Code § 1770(a)(7), defendants have engaged
16 in deceptive, untrue and/or misleading advertising that their cellular service is of a particular
17 standard, quality, or grade, when it is of another;

18 (c) In violation of Civil Code § 1770(a)(9), defendants advertised their
19 cellular service with the intent not to sell it as advertised or represented; and

20 (d) In violation of Civil Code § 1770(a)(14), defendants have
21 misrepresented that a transaction confers or involves legal rights, obligations, or remedies upon
22 plaintiffs and members of the class regarding the provision of cellular service, when it does not.

23 44. As a result, plaintiffs and the members of the class have suffered
24 irreparable harm, entitling them to both injunctive relief and restitution, compensatory and
25 punitive damages, disgorgement of wrongfully obtained profits, and attorneys' fees and costs.

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28 **Naylor Decl. 14**

1 FOURTH CAUSE OF ACTION
2 (Fraud and Deceit)

3 [On Behalf of Plaintiffs Spielholz, Petcove and All Others Similarly Situated]

4 45. Plaintiffs hereby incorporate by reference the allegations contained in all
5 preceding paragraphs of this Second Amended Class Action Complaint.

6 46. In order to maintain and/or increase its sales and profits, defendants,
7 through their advertising, promotional campaigns and marketing, have, by the use of false
8 statements and/or material omissions of act, intentionally misrepresented the following:

9 (a) that the defendants' coverage area and cellular service may be used
10 by all subscribers anywhere within the area from the Nevada and Arizona borders to Catalina
11 Island;

12 (b) that service is seamless and available within the advertised calling
13 area when substantial coverage gaps occur within the cellular system which substantially reduce
14 the breadth and reliability of cellular service; and

15 (c) that the cellular telephone equipment promoted and sold by
16 defendants will be able to access defendant's system.

17 47. In making these misrepresentations of fact to prospective and current
18 subscribers while knowing such representations to be false, defendants have intentionally
19 misrepresented material facts and breached their duty not to do so.

20 48. Plaintiffs and the members of the class were unaware of defendants'
21 affirmative misrepresentations and failure to disclose the fact that defendants' advertised
22 equipment, cellular service, and coverage area was not accurate, and was, in fact, false and
23 misleading. Plaintiffs and the members of the class reasonably relied on defendants'
24 representations regarding their equipment, service, and coverage area to their detriment, and as
25 a direct result, suffered damages, in an amount according to proof at the time of trial.

26 49. As a result of defendants' false representations and failure to disclose the
27 true facts, plaintiffs and the members of the class have suffered injury entitling them to
28 compensatory and punitive damages in an amount to be proved at trial.

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1 FIFTH CAUSE OF ACTION
2 (Negligent Misrepresentation)

3 [On Behalf of Plaintiffs Spielholz, Petcove and All Others Similarly Situated]

4 50. Plaintiffs hereby incorporate by reference the allegations contained in all
5 preceding paragraphs of this Second Amended Class Action Complaint.

6 51. In making the misrepresentations of material fact to plaintiffs and the
7 class as described herein, defendants failed to fulfill their duty to disclose all the material facts as
8 set forth above. As an actual and proximate result of defendants' negligence, plaintiffs
9 Spielholz, Petcove and the class were deceived and misled as to the service they purchased, and
10 were damaged thereby.

11 52. Plaintiffs and the members of the class were unaware of defendants'
12 affirmative misrepresentations and failure to disclose the fact that defendants' advertised
13 equipment, cellular service, and coverage area was not accurate, and was, in fact, false and
14 misleading. Plaintiffs and the members of the class reasonably relied on defendants'
15 representations of their equipment, service, and coverage area to their detriment.

16 53. As a direct result, plaintiffs and the members of the class suffered
17 damages, in an amount according to proof at the time of trial.

18 SIXTH CAUSE OF ACTION
19 (Breach of Contract)

20 [On Behalf of Plaintiffs Spielholz, Petcove and All Others Similarly Situated]

21 54. Plaintiffs hereby incorporate by reference the allegations contained in all
22 preceding paragraphs of this Second Amended Class Action Complaint.

23 55. Plaintiffs Spielholz, Petcove and members of the class have entered into
24 contracts with defendants, by and through defendant LA Cellular, to purchase equipment and
25 use and receive analog and/or digital cellular service in the advertised coverage area in exchange
26 for the payment of monthly fees. Defendants, therefore, assumed contractual duties and
27 obligations to provide equipment and cellular service to plaintiffs and members of the class
28 within the advertised coverage area.

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56. In making payments to defendants as they came due, plaintiffs have satisfied their obligations under their contracts.

57. Defendants failed to perform as required by the contract because they did not provide equipment and/or install sufficient cell sites and/or channels and other equipment to enable subscribers to obtain the seamless coverage they advertised. Such failure to perform was unjustified and unexcused and clearly was in breach of defendants' promise to comply with the terms and conditions of contracts entered into with plaintiffs and members of the class.

58. Plaintiffs Spielholz, Petcove and the members of the class have suffered damages in being unable to initiate and receive calls in areas where defendants claimed that they not only could service their cellular requirements, but also were able to do so in areas where their key competitor could not. As a result Ms. Spielholz and the members of the class are entitled to compensatory damages in an amount to be proved at trial.

SEVENTH CAUSE OF ACTION (Breach of the Implied Covenant of Good Faith and Fair Dealing)

[On Behalf of Plaintiffs Spielholz, Petcove and All Others Similarly Situated]

59. Plaintiffs hereby incorporate by reference the allegations contained in all preceding paragraphs of this Second Amended Class Action Complaint.

60. Implied in every contract is a covenant of good faith and fair dealing.

61. Defendants breached the covenant of good faith and fair dealing by misrepresenting and failing to disclose that there exist gaps or dead zones in LA Cellular's advertised coverage area and by failing to disclose that its system lacks the capacity to provide the seamless calling area it advertises.

62. As a result, plaintiffs and the members of the class have suffered injury entitling them to damages in an amount to be proved at trial.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs and the class pray judgment against defendants, and each of them, as follows:

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1 1. For an order certifying the class, appointing plaintiffs Spieholz and
2 Petcove as the class representatives, and appointing the law firms representing plaintiffs as class
3 counsel;

4 2. For a permanent injunction enjoining defendants, their partners, joint
5 venturers, agents, servants, employees, and all persons acting under, in concert with, or from
6 them directly or indirectly, or in any manner, in any way engaging in deceptive practices by
7 continuing to falsely advertise the breadth and reliability of its cellular equipment and/or its
8 service to its subscribers and potential subscribers;

9 3. For a permanent injunction enjoining defendants, their partners, joint
10 venturers, agents, servants, employees, and all persons acting under, in concert with, or for
11 them directly or indirectly, or in any manner, from selling equipment and/or its cellular
12 service to consumers on the basis of the existing LA Cellular advertisements and
13 representations;

14 4. For compensatory damages and/or full restitution of all funds acquired
15 from defendants' unfair business practices;

16 5. For punitive damages, to be awarded to plaintiffs and each class member;

17 6. For imposition of a constructive trust upon all monies and assets
18 defendants have acquired as a result of their unfair, unlawful and/or fraudulent and misleading
19 practices;

20 7. For costs of suit herein incurred;

21 8. For both pre- and post-judgment interest on any amounts awarded;

22 9. For payment of reasonable attorneys fees; and

23 10. For such other and further relief as the Court may deem proper.

24 **DEMAND FOR JURY TRIAL**

25 Plaintiffs hereby demand a trial by jury.

26 DATED: December 11, 1998

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